Supreme Court, U.S.
FILED

No. 02-1424 MAR 25 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FRED BERRE DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Does prejudice under *Strickland* require a reasonable probability of a different verdict or just a single juror who would not vote for death had the mitigating evidence found by habeas counsel been presented?

2. Does the Sixth Amendment right to effective assistance of counsel require a defense attorney to "unearth" and present "all relevant mitigating information . . . for consideration at the capital sentencing phase" despite the defendant's opposition and roadblocks?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FRED BERRE DOUGLAS, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals reversed Douglas' death penalty after the district court had found effective assistance of counsel under *Strickland.* (App. A at 1-25, *Douglas v. Woodford*, __ F.3d __ (9th Cir. 2003). The order of the District Court denying habeas corpus relief is unreported. (App. B at 26-132.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on January 24, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL ISSUE INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. (Sixth Amendment to the United States Constitution.)

STATEMENT OF THE CASE

Douglas' conviction and death sentence were affirmed by the California Supreme Court nearly thirteen years ago. *People v. Douglas*, 50 Cal.3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990). On January 19, 1994, he filed a federal habeas corpus petition alleging ineffective assistance of counsel and was ultimately granted an evidentiary hearing on several allegations of ineffective assistance.

Evidence was taken from February 17 to February 20, 1998, and both parties presented full briefing of the issues to the district court. On November 9, 2000, the district court denied the petition for habeas corpus relief in a 110-page unpublished opinion. (App. B at 26-132, Facts 27-31 Ineffective Assistance at Penalty.)

On appeal, the Ninth Circuit reversed Douglas' death penalty finding insufficient investigation by Douglas' trial counsel of evidence in mitigation and prejudice, because a single juror at trial may have voted against death had he or she heard the evidence unearthed by habeas counsel. (App. A at 16-18.)

STATEMENT OF FACTS

Guilt Phase

On August 13, 1982, Douglas killed two teenage girls, Peggy Krueger and Beth Jones, in the desert near Indio, California, after promising them money for nude bondage photographs. Douglas tied up the naked girls, ordered them to

perform sexual acts with each other and him, then strangled both girls. He instructed Richard Hernandez, a man he employed in the Orange County furniture refinishing and upholstery shop Douglas owned and operated,[1] to bury the bodies. They returned to Douglas' shop. Within a couple of days, Douglas and Hernandez left Orange County, first for Canada and later for Mexico, after being questioned about the disappearance of the two girls.

On March 27, 1983, a photographer taking pictures of wild-flowers in the desert discovered the grave of the two girls and reported it to authorities. Subsequently, Douglas was arrested in Las Vegas in February 1984, and Hernandez was captured in Mexico and turned over to Orange County law enforcement officers in March.

After negotiating immunity, Hernandez testified about Douglas' prior nude photographs of Hernandez with various women, Douglas' planning the outing with Krueger and Jones and the details of their murders.

Douglas presented an alibi defense and asserted Hernandez was lying. A friend of Krueger testified she saw both victims at a mall one month after Hernandez said the girls were killed. Douglas' business associate testified that he had spoken to Douglas by telephone between 5:00 and 6:30 a.m. on August 13, 1982, the same time Hernandez testified that he and Douglas were driving to the desert with the victims. He remembered the date because he was writing a check to send an employee to A-1 Foam to pick up materials.

On rebuttal, an A-1 Foam employee testified his company did not take two-party checks, the sales slip indicated the owner had picked up the materials and the check was not

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1. Hernandez was a retarded heroin addict who was paid with food, beer, lodging and occasional, minor, spending money.

written up ahead of time because a $1 item had been added to the original order.

Penalty Phase Trial

In 1976, a woman who worked for Douglas at his lounge/Italian restaurant agreed to pose for nude photographs. In the desert, Douglas showed her a gun and she feared for her life while posing for him.

A second woman testified she was going to model clothes in Yucca Valley but she passed out after Douglas grabbed her from behind. When she woke up, she was tied and naked. Douglas was standing in front of her with a pistol in his hand. He put the gun to her head and ordered her to urinate on him or he would kill her. He also forced her to orally copulate him. She ultimately talked Douglas into untying her and making her his partner in his plan to pick up hitchhikers, torture them, photograph the agony on their faces, and kill them for a book to be published in Canada. She went to the police when she saw newspaper articles about Douglas' arrest in this case.

In June or July of 1977, a third woman, who was working as a prostitute, was hired by Douglas, who spoke to her about snuff movies. He wanted her to find young girls, preferably thirteen to fourteen years old, who would be tied up for photos or porno films. The woman was to torture them while he took pictures. While watching a movie about child abuse, the woman "got a feeling this guy is for real" so she called the police. She met with Douglas while wearing a body wire and introduced two policewomen to him as potential victims. The four of them went to the desert, where Douglas was arrested. He was tried on those crimes but the jury was unable to reach a verdict.

In mitigation, the defense introduced the testimony of Douglas' wife of thirty-three years, their son, a long-time friend, and a neighbor, who all testified Douglas was not capable of killing anyone. They described him as a kind man who had

been raised as an orphan by several families that did not treat him well. He ran away from home in Chicago at the age of fifteen to enlist in the Marines and organized recreational activities in the military. As an adult he was hard working and generous. He was a "soft touch" for people who needed food or other help.

Federal Evidentiary Hearing On Claims Including Effective Assistance Of Counsel At Penalty Phase

Attorney George Peters was appointed to represent Douglas on March 8, 1984. He had psychiatrist Kaushal Sharma and psychologist Martha Rogers appointed to help him evaluate Douglas for any serious psychological problems, although Peters did not see ". . . anything amounting to competency problems or psychosis problems." Drs. Sharma and Rogers did not find any evidence of lack of competence or psychosis. Nevertheless, Peters hoped to dig deeper into the subject although Douglas maintained there was nothing wrong with him, was furious at his prior attorney for characterizing him as a dirty old man, said he never solicited or intended to commit murder, and was "very, very adamant" about his alibi witnesses. Informally, Peters continued to consult with Dr. Rogers, who informally told Peters, Douglas was "not crazy. He's not insane. He's not incompetent, He's weird." Peters had the same reaction. (See App. B at 85-86, 79-80.)

Peters still hoped to find some mental aspect relevant to first degree murder or special circumstances. For example, he tried unsuccessfully to broach with Douglas the suggestion by Dr. Rogers that there could be some latent homosexual aspects to the murder. Given the client's demand that Peters not delve into his mental health and the inability of the two experts to find any evidence of lack of competency and psychosis, Peters explored as many pre-trial legal issues as possible. He also attacked the credibility of Hernandez, combined with the best witnesses he could find for Douglas' alibi. (Douglas'

credibility with his attorney was eroded by the fact that many alibi witnesses did not stand up to Peters' questioning.) (See App. B at 79-80.)

Douglas "was extremely adamant" throughout the entire trial that he did not want psychological defenses presented, and he admitted only to having claustrophobia. Also, he would not make any admission regarding the murders or even being present at the murder scene. Douglas "had an aversion to [psychological] testing and maintained he was innocent" and would not allow psychological testing to be used at the guilt phase or to explain the crimes at the penalty phase. (See App. B at 79-80.)

Peters spoke with the attorney who had represented Douglas in the 1977 charges and had discussed the 1977 case with Douglas. However, Peters and his investigators did not locate Dr. Lewis Broussard, who had concluded that Douglas was psychotic and delusional at the time of the 1976 and 1977 incidents. Dr. Broussard was never called as a witness in the 1977 case. He did not maintain any tests, scores or notes from Douglas' 1977 case. (See App. B at 79-80.)

At the evidentiary hearing in the district court, Dr. Broussard testified that he believed Douglas was unable to run his own business in the 1970's and 1980's and that Hernandez (Douglas' retarded, heroin addicted, employee who worked for Douglas for food, beer and small change) was the mastermind of the capital crimes. (App. B at 80-82.)

In the late 1970's and early 1980's, Douglas owned and operated several businesses in Orange County including an Italian restaurant, bars and an upholstery-refinishing shop. He also trained his son how to estimate jobs, do the work and run the upholstery-refinishing business. (See App. B at 88.)

Douglas was neglected and physically punished as a child and may have been sexually abused in one of his foster homes. He was raised in poverty. (App. B at 96-99.) Doctors hired by habeas counsel who examined Douglas on death row in the 1990's opined, in differing diagnoses, that Douglas

suffered from delusions, mania, depression, bipolar disorder and frontal lobe damage. (App. B at 82-84.)

Dr. Rogers, who had spent five hours interviewing Douglas plus two hours testing him in 1984, saw no indication of major mental disorder and reported that fact to attorney Peters. She administered eight tests and Douglas was "very quick, very attentive and very quick." While the main purpose of her evaluation was to assess Douglas' claustrophobia, "... no mental health evaluator is going to go in and look just at phobia. You want to get some generic picture of a person and I did a general screening to look at the possibility of other issues." (App. B at 84-85.)

Dr. Rogers sat in on testimony of Douglas' experts at the evidentiary hearing. She also compared the 1997-1998 MMPI administered by Dr. Van Gorp to her own 1984 testing and found the results of both tests very similar. She also compared the 1984 and 1997 Rorschach tests and found the indicators were not consistent with a major mental disorder. Dr. Rogers did not change her opinion, that there was no indication of major mental disorder in Douglas. (App. B at 84.)

District Court Findings When Denying Relief

The district court expressly found that trial counsel conducted a constitutionally acceptable investigation into Douglas' background and mental state. (App. B at 85.) Further, none of the experts retained by Douglas on habeas corpus provided compelling evidence of a mental disorder, disease or defect. (App. B at 87-88.) The district court summarized the expert testimony given at the evidentiary hearing, evaluated the credibility of the witnesses and addressed Douglas' specific claims.

The district court heard witnesses at the evidentiary hearing regarding additional evidence that could have been presented regarding Douglas' background, character and mental state. (App. B at 96-99.) The court expressly found the trial

attorney's failure to uncover the background information was not constitutionally deficient, largely because Douglas himself told his attorney he did not know who his mother was and no birth certificate existed for him. The attorney verified the lack of a birth certificate and did not send anyone to Chicago to investigate further because Douglas falsely told him that his parents were dead and his childhood was a "blank." (App. B at 99-101.)

The district court further found that the trial attorney clearly considered presenting mental health evidence at the penalty phase and had two mental health experts appointed to assess his client's mental state, but Douglas stopped cooperating with the mental health experts and wanted nothing to do with psychiatric defenses of any sort. Consequently, the attorney reasonably relied on the experts he had retained and the fact that they found no mental defect or illness relevant to his case. (App. B at 93-94, 99-101.)

REASONS FOR GRANTING THE WRIT

This case presents an opportunity for this Court to correct distortions of both prongs of the *Strickland* test by the Ninth Circuit, to determine whether a reasonable probability of a different vote by a single juror in a capital case satisfies the reasonable probability of a "different result" requirement of prejudice under *Strickland* and to establish uniformity among the circuits.

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). A state prisoner claiming violation of this right must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "It is past question," *Williams v. Taylor*, 529 U.S. 362, 390 (2000), that *Strickland* sets forth the rules by which any claim of ineffective assistance by trial counsel must be judged.

It is equally clear the same standards apply to both the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 686-87

"As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002), *citing Strickland* at 694.

This case erroneously reversed the penalty phase of Douglas' capital murder by holding one juror may have voted against death had he or she heard the medical and social evidence presented on habeas. The State contends a reasonable probability of changing the vote of a single juror is not sufficient to constitute a reasonable probability of a different "result" within the meaning of *Strickland*.

Further, the Ninth Circuit also held it was "imperative that all relevant mitigating evidence be unearthed so the trial attorney should have continued to investigate Douglas' medical-social history despite Douglas' roadblocks that the district court found justified the attorney's abandonment of further investigation.

SUMMARY OF ARGUMENT

On appeal, the Ninth Circuit reversed the district court and Douglas' death penalty, based on its conclusion that one juror might not have voted for death had the mental and social histories unearthed by habeas counsel been presented at trial. The reasonable probability of a different "result" requirement of *Strickland* for prejudice should require a reasonable probability of a different verdict by the entire jury.

The Ninth Circuit also established a new rule for the performance prong of *Strickland*. Professional error in conducting the mitigation investigation was judged by evidence habeas counsel unearthed, rather than by evaluating the reasonableness of what the defense attorney in fact did in 1984 under the circumstances of this case. The Ninth Circuit also

ignored the district court's factual finding that Douglas stopped cooperating with mental health experts and obstructed further investigation of his social history, and boldly stated that lingering doubt was "not a viable option" at penalty.

Therefore, certiorari should be granted to correct the distortions of both prongs of the *Strickland* test involved in reversing Douglas' penalty.

A. The Ninth Circuit Erroneously Construed The Prejudice Prong Of *Strickland* By Holding That A Single Juror Might Not Have Voted For Death Had All The Evidence Found By Habeas Counsel Been Presented At Trial

The district court denied habeas relief after finding neither ineffective investigation nor prejudice. In overturning the death sentence in this pre-AEDPA case, the Ninth Circuit used the wrong test for prejudice. It stated that a single juror may have changed his or her vote based on the evidence uncovered by habeas counsel which had not been found by the trial attorney nearly twenty years ago. Prejudice should require a reasonable probability of a different jury verdict.

As explained in *Mickens* (slip op. at 3-4), the Court has established limited exceptions to the requirement of an "individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." One may arise where trial counsel actively represented conflicting interests (*id.*), a circumstance not at issue in this case. Otherwise a defendant may be entitled to a presumption of prejudicial effect "where counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 8. The Court explained in *U.S. v. Cronic*, 466 U.S. 648, 659 (1984), that other than a complete absence of counsel a denial of the Sixth Amendment right may occur "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ."

A single juror does not yield a different "result" within the meaning of *Strickland*. Under California law, if a jury is not able to reach a verdict on penalty, the trial court has no authority to enter a judgment of life without possibility of parole. A new jury must be selected for a new penalty trial. Cal. Penal Code, § 190.4(b); *People v. Thompson*, 50 Cal. 3d 134, 176, 785 P.2d 857, 266 Cal. Rptr. 309 (1990). California's death penalty law expresses no preference as to the appropriate punishment. *People v. Samayoa*, 15 Cal. 4th 795, 852, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997).

Douglas presented an alibi defense at the guilt phase and consistently maintained his innocence. Consequently, the attorney presented a lingering doubt defense at penalty but at the same time argued something was not right in Douglas, possibly due to abuse as a child. The Ninth Circuit reversed Douglas' death sentence based on its determination that "'lingering doubt' was not a viable option" once the jury had convicted him on the testimony of his employee.[2] (App. A at 17-18.)

The Ninth Circuit found that psychological and psychiatric testimony at the penalty phase,

> could have invoked sympathy from at least one member of the jury at the penalty phase, particularly when considered in connection with additional sociological history evidence discussed above. [Citation.] Douglas' alibi defense had failed; the jury

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2. Lingering doubt has "'been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhard v. McCree*, 476 U.S. 162, 181 (1986) [citation]; *accord* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1 (1988).

> had obviously accepted Hernandez's testimony and, particularly in light of the additional penalty phase testimony introduced by the prosecution, "lingering doubt" was not a viable option. [Citation.] Accordingly, there was nothing to lose by presenting Dr. Broussard's testimony about Douglas' mental health.

(App. A at 17-18, emphasis added.)

The Court of Appeals not only re-weighed the evidence, changed the district court's credibility findings and overturned the penalty phase finding that the trial attorney's performance was both deficient and prejudicial, it essentially determined there is only one constitutionally effective way to present penalty evidence and defined *Strickland* prejudice as one potential vote against the death penalty.

The effect of this decision is to require counsel to abandon lingering doubt and present an inconsistent defense at the penalty phase. The Ninth Circuit has basically established what is in effect a per se rule of prejudice whenever potential mitigating evidence is uncovered after trial, because one juror's vote might have been affected.[3]

Moreover, by eviscerating the *Strickland* standard, the Ninth Circuit has created new rules in violation of *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit has thus established both prejudice and performance tests that are fundamentally at odds with *Strickland* and yet will govern all future Ninth Circuit capital cases unless this Court grants certiorari. The Ninth Circuit has established new rules by interpreting *Strickland* prejudice as a reasonable probability

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3. Judge Kleinfeld expressly observed that the court had created a per se rule of reversal whenever trial counsel had not introduced specific, newly developed evidence at the penalty phase. *See Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (Kleinfeld, J., dissenting).

that one juror might not vote for death, and the performance standard by essentially ruling that there was only one constitutional way to present the penalty: all the mitigation found by habeas counsel.

After boldly stating that "lingering doubt" was no longer a viable option, the Ninth Circuit opines that while the failure to discover "Dr. Broussard [did not impact] . . . the outcome of the guilt phase, the same cannot be said of the penalty phase. . . ." where it might sway one juror. (App. A at 17.) In other words, the Ninth Circuit found prejudice at the penalty phase because one juror might have refused to vote for death in light of the new evidence presented by habeas counsel.

Under this new-evidence-found-by-habeas-counsel "could have invoked sympathy" in one juror prejudice test (App. A at 17), it is hard to imagine any capital case that could not be reversed as to penalty. This cannot possibly be the prejudice required under *Strickland*. This Court faced very similar questions when considering the proper test for "confusing" jury instructions in *Boyde v. California*, 494 U.S. 370 (1989). There, this Court noted that in previous cases "... we made reference both to what a reasonable juror '*could*' have done and what he '*would*' have done. . . . whether there was a '*substantial possibility* that the jury may have rested its verdict on the "improper" ground,'" . . . and how reasonable jurors "*would have*" applied and understood the instructions." *Id.* at 379. It decided in that case that the "proper inquiry" was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380, emphasis added. This Court looked at how Boyde's entire jury would interpret an instruction after observing that:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberation process, with common sense

> understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. *Boyde v. California,* 494 U.S. at 380-381.

By analogy, the test for *Strickland* prejudice should also be judged by the reasonable likelihood that the entire jury would have voted against the death penalty.

The circuits are split regarding whether *Strickland* prejudice requires a different "result" of the whole jury or a single juror. Although the opinions of this Court speak of a different "result" in the proceedings but for the professional error, result has never been expressly defined. The two cases directly on point go different directions: one requires a different verdict and the other a single juror.

The Fifth Circuit has compared the actual evidence presented at the penalty trial against "all the mitigating evidence contained in the post-conviction record" to see if "there is a reasonable probability at least one juror could reasonably have determined that because of . . . [the defendant's] reduced moral culpability, death was not an appropriate sentence. . ." *Neal v. Puckett*, 239 F.3d 683, 691-92 (5th Cir. 2001).

The Fourth Circuit has stated that "The *Strickland* prejudice standard assumes twelve reasonable, conscientious, impartial jurors. Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice."[4] (*Williams v. Taylor*, 163 F.3d 860, 868

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4. It appears that most circuits by implication require a different verdict for a different "result" under *Strickland. Lamb v. Johnson*, 179 F.3d 352, 359 (5th Cir. 1999) ["Had the evidence been presented to the jury, a life sentence would have resulted"]; *Perry v. McCaughtry*, 308 F.3d 682, 689 (7th Cir. 2002) [the state of Wisconsin properly applied *Strickland* when considering "whether the jury could have independently reached the verdict it did . . ."]; *Johnson v. Norris*, 207 F.3d 515, 518-19

(4th Cir. 1998). The court expressly found that a single juror is not the test. It stated that "a court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. *See Strickland*, 466 U.S. at 695, . . . noting that a finding of prejudice does not "'depend on the idiosyncracies of the particular decision maker such as unusual propensities toward harshness or leniency.'" *Ibid.*

A different "result" should require a reasonable probability of a different verdict by the entire jury, not merely the possibility of convincing one juror. Logically, that one juror out of twelve might vote against death does not indicate the result of a defendant's trial is not reliable. Also, a single juror's vote is not a "result." This is especially true in California, where a hung jury results in a new penalty trial, not a different resolution of the proceeding.

The need for this Court to clarify whether a different result means a different verdict or a single juror not voting for death is also most evident in *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998). Thomas claimed an unreasonable investigation because his attorney did not even subpoena his prison and school records "which would have revealed serious psychological problems." *Id.* at 515. The majority decided it was reasonable for the lawyer to place a certain reliance on his client, family and friends, who in Thomas' case denied the existence of psychological problems, so that "the lawyer cannot

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(8th Cir. 2000) [but for the attorney's "unprofessional behavior, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.]; *More v. Gibson*, 195 F.3d 1152, 1178 (10th Cir. 1999) [ineffective assistance requires a reasonable probability that absent the error the sentencer . . . would have concluded death was not warranted.]; *Duren v. Hopper*, 161 F.3d 655, 664 (11th Cir. 1998) [prejudice requires error that would have ". . . altered the result of the sentencing proceeding"].

be faulted for failing to go down the path thus closed off." *Id.* The dissent, on the other hand, observed that under Illinois law "a defendant cannot receive the death sentence if one juror objects to the imposition of that sentence." Thus, the dissent argued that in Illinois the test for prejudice under *Strickland* ought to be that there is a reasonable probability that, but for counsel's unprofessional error, one juror would have voted against the death penalty. *Id.* at 523.

Further, different panels within the Ninth Circuit seem to address the prejudice aspect of the ineffective assistance of counsel question by different standards. This case was decided on a single juror test, yet other panels require a different verdict. *See Woodford. v. Silva*, 279 F.3d 849 (9th Cir. 2002) [". . . we find that it is reasonably likely that the jury would have concluded that the balance of aggravating and mitigating circumstances would not warrant death." *Strickland*, 466 U.S. at 694, 695]; *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (1998) [". . . the jury would [not] have changed its sentence in light of the new evidence."]

This Court should grant certiorari to decide this important issue because it arises in so many capital cases throughout the nation and the circuits are split on the proper standard.

B. The Reasonableness Of Trial Counsel's Investigation Of Social And Mental History Must Be Judged On The Reasonableness Of What He Did Under The Circumstances, Not What Habeas Counsel Found Or What Should Have Been Done Based On Theories Or Evidence Developed By Habeas Counsel

The Ninth Circuit found Douglas' trial attorney did an inadequate investigation regarding Douglas' mental health and social history. However, the Ninth Circuit did not examine the reasonableness of the investigation done by trial counsel in

1984. Instead, it found ineffective assistance because the attorney should have found the evidence developed by habeas counsel nearly twenty years later, despite the fact that Douglas objected to such investigation and actively threw his attorney off the trail.

Douglas had said one caretaker put him in a closet when going out to drink. Contrary to the conclusion of the Ninth Circuit, that fact did not put the attorney "on notice" or require him to shift focus and present mitigation that was inconsistent with Douglas' persistent and constant claims of innocence. In effect, this case requires a perfect investigation in a capital case without regard to roadblocks put up by the defendant, limited resources, time constraints or the professional judgment of counsel. The Ninth Circuit expressly held, contrary to the district court's findings, that counsel could not rely on the lack of significant findings by the psychiatrist and psychologist he hired to evaluate Douglas before trial nor on Douglas' representations that his life was a "blank." This case was tried in 1984. Penalty trials were very short at that time. *See In re Jesse James Andrews*, 28 Cal. 4th 1234, 52 P.3d 656, 124 Cal. Rptr. 2d 473 (2002); *People v. Andrews*, 49 Cal. 3d 200, 209, 776 P.2d 285, 260 Cal. Rptr. 583 (1989). After taking evidence and evaluating the credibility of the witnesses, the district court denied habeas relief. It found the trial attorney's investigation adequate, especially in view of the fact that Douglas told his attorney he wanted nothing to do with mental health defenses and neither he, his wife nor his son put the trial attorney on notice of any mental illness. Likewise, Douglas obstructed any further investigation of his social history.

Does the Sixth Amendment compel a defense attorney in a capital case to continue investigating the defendant's social-medical history regardless of the information received from the defendant, family members and consulted mental health experts, despite the defendant's opposition and roadblocks? Because a "wide range of reasonable professional conduct" will satisfy the

Strickland standard, 466 U.S. at 689, this Court has "consistently declined to impose mechanical rules on counsel . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The relevant question is whether trial counsel's decisions were reasonable. *Id.*

This Court recently re-emphasized both the limited nature of habeas review and *Strickland's* caution that a reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission was unreasonable "in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685 ___ (2002).

This Court recently denied certiorari in *Caro v. Woodford*, (*Caro II*) 280 F.3d 1247 (9th Cir. 2002). *Caro v. Calderon (Caro I)* 165 F.3d 1223 (9th Cir. 1999), concluded that trial counsel in a capital case have a duty to consult specific experts in preparation for the penalty phase. Despite having hired four mental health experts, trial counsel were deemed deficient because none of the experts were neurologists or toxicologists. 165 F.3d at 1226. There, as well as in this case, the Court of Appeals based its holding on the fact that federal habeas counsel had later found experts who were willing to opine that Caro suffered brain damage from exposure to toxic pesticides. The Court of Appeals necessarily assumed that trial counsel must have been deficient in not uncovering the same opinions nearly twenty years earlier. It erroneously focused on what could have been found in a perfect investigation 20 years later.

The relevant *Strickland* inquiry is not what could have been pursued in investigation based on what habeas counsel are able to develop many years later, but whether the choices made by trial counsel were reasonable at the time he made them. *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998); *Babbitt v. Calderon*, 151 F.3d at 1175, *cert. denied*, 525 U.S. 1159 (2000).

The opinion in this case completely shifts the focus from the reasonableness of what counsel actually did at the time of trial, under the circumstances counsel had to work with, to what allegedly should have been done based on theories and evidence developed 20 years later.

Babbitt correctly applied *Strickland.* There, the attorney was found constitutionally effective when he did not pursue more mental health investigation because he had spoken with Babbitt, family members and friends and none had reported mental illness. Here, the Ninth Circuit opinion notes that "Douglas was not forthcoming with useful information [but] . . . this does not excuse counsel's obligation to obtain mitigating evidence from other sources. [Citation.]" When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigation evidence be unearthed for consideration. *Caro I,* 165 F.3d at 1227. This duty to investigate is not limitless . . ." (App. A at 13, citing *Babbitt v. Calderon,* 151 F.3d at 1175, emphasis added.).

While paying lip service to the proposition that the duty to investigate is not limitless, the Ninth Circuit then ignores the fact that counsel in this case, just like counsel in *Babbitt,* had in fact spoken to family members and friends of Douglas without any of them reporting a history of mental illness. In other words, the *Babbitt* panel found counsel to be effective while this panel found Douglas' attorney constitutionally inadequate on essentially the same facts.

In summary, the Ninth Circuit's approach – one based not on what was done but solely on what was developed later – is utterly unfaithful to the reasonableness standard mandated by this Court in *Strickland.*

On appeal, the Ninth Circuit simply reversed the district court's analysis and conclusions. It re-weighed the evidence taken by the district court and reached the opposite conclusions. This remarkable departure from the reasonableness standard of *Strickland* cannot be dismissed as a careless peripheral reference in the majority opinion. Rather, the court

characterized *Caro*'s newly-announced duty to "unearth" all available mitigating evidence as a holding, thereby binding future Ninth Circuit panels which might be confronted with similar issues. *See, e.g., CaroII,* 280 F.3d at 1247, *Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1994).

In the Ninth Circuit's view, the two mental health experts consulted by counsel and numerous lay witnesses interviewed did not satisfy the performance prong of *Strickland* because habeas counsel were able to find more. Of course habeas counsel found more. They had the benefit of hindsight, more resources and no responsibility to fully investigate the crime and victims as well as the countless witnesses Douglas kept insisting would prove his alibi. In short, habeas counsel did not have the time or the financial constraints of the 1984 trial attorney, whose responsibility it was to prepare for both the guilt and penalty phases of Douglas' trial.

The requirement that trial counsel must find all mitigation to avoid being held deficient, as well as the affirmative duty to provide information to mental health experts whether requested or not, place upon trial counsel explicit duties which are inconsistent with this Court's refusal to establish "bright-line" rules of performance. *Roe v. Flores-Ortega*, 528 U.S. at 480.[5/]

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5. The imposition of these added burdens on trial counsel is also inconsistent with the prevailing understanding of *Strickland*'s teaching. *See, e.g., Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992), *cert. denied* 506 U.S. 958 (1992) [counsel is not obligated to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders"]; *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir.), *cert. denied*, 516 U.S. 849 (1995) [same]; *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) [counsel is not obligated to track down every record that might affect expert diagnosis].

Moreover, the Ninth Circuit applies different performance standards to counsel in the guilt as opposed to the penalty phase of a trial and did so in this case.[6] App. A at 17-18; *compare Caro v. Calderon*, 165 F.3d at 1226-27 and *Caro v. Woodford* 280 F.3d 1247; *see also Silva v. Woodford*, 279 F.3d 825, 843 (9th Cir. 2002); *Wallace v. Stewart*, 184 F.3d 1112, 1116-17 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000). As noted above, this Court determined in *Strickland* that the same test applies to claims of ineffective assistance in both the guilt and penalty phases of a capital case. *See also Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998) [capital defendants faced the same standard for determining prejudice as non-capital defendants].

The higher performance standard and per se deficiency rule imposed in this case by the Ninth Circuit are indefensible under this Court's precedent and also violate *Teague*. The Ninth Circuit's requirement that all possible mental, emotional or background evidence must be found and considered before counsel can make any choices based on tactics, limited resources or case priorities ignores the realities of legal practice and requires perfect penalty investigations and trials rather than fair ones. See also *Kevin Wiggins v. Smith*, 02-311,[7] set for oral argument in this Court on March 24, 2003,

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6. In a recent non-capital memorandum decision the Ninth Circuit expressly stated that its rejection of ineffective assistance of counsel claims "would probably be different" if the same claims related to the penalty phase of a capital trial. *Easley v. Clarke*, No. 00-16205 (9th Cir. February 21, 2002).

7. *Wiggins* raises a performance issue very similar to this case. In *Wiggins*, as in the case at bench, counsel did investigate, but did not have as detailed or graphic a history as prepared on habeas. However, that is not constitutional deficiency. *See Gilliam v. State*, 331 Md. 651, 680-82, 629 A. 2d 685, 700-02 (1993), *cert. denied*, 510 U.S. 1077 (1994); see

and two other capital cases in which petitions are pending after penalty was reversed for "ineffective" assistance. *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) and *Jennings v. Woodward*, 290 F.3d 1006 (9th Cir. 2002).

Finally, the Ninth Circuit's reversal is premised on the erroneous conclusion that "lingering doubt" is not a viable option once the jury accepted Hernandez's testimony. Nothing supports this conclusion. Hernandez was impeached with prior convictions, longtime drug use and having drugs in the jail. Further, studies indicate lingering doubt is probably the most effective method of avoiding the death penalty. *Tarver v. Hopper,* 169 F.3d 710, 715 (11th Cir. 1999). The choice to use the strategy of lingering doubt must be made by trial counsel, who is in the best position to judge its viability. *See Chandler v. United States*, 218 F.3d 1305, 1361 (11th Cir. 2000) (dissent).

By proceeding as he did, trial counsel also preserved a lingering-doubt defense. "'[R]esidual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) [citation]. Indeed, a comprehensive study of the opinions of jurors in capital cases concluded that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' factor," going on to explain that "the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly

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also *Burger v.Kemp*, 483 U.S. 776, 788-96 (1987). More important, counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing. Counsel is *not* required to present every conceivable mitigation defense if, after proper investigation and review, he or she concludes that it is not in the defendant's best interest to do so. *See Darden v. Wainwright*, 477 U.S. 168 (1986); *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir.), *cert denied*, 493 U.S. 1011 (1989).

speaking," rather "[t]he best thing [a defendant] can do, all else being equal, is to raise doubt about his guilt." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1568 (1998) (footnote omitted); *accord* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988) [stating that "[t]he existence of some degree of doubt about guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied"].

While this is a pre-AEDPA case, it is nevertheless significant that the California Supreme Court had denied habeas corpus of Douglas' claims of ineffective assistance of counsel. Reversing the penalty in this case is the type of overreaching that has led dissenting opinions in other cases to observe: "The panel has given lip service to the statutory habeas standard but hasn't followed it. The opinion gives inadequate deference both to the constitutional analysis of the Court of Appeal of the State of California and to the judgments of defense counsel about how to best argue for his client."[8/] *Gentry v. Roe,* __ F.3d __(9th Cir. 2003), 2003 Daily Journal D.A.R. 1092.

Another dissenting judge observed in a different case that the majority "analyze this case as if they were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under section 2254." *Gentry*, at 1275. Indeed, this Court has also observed and reminded the Ninth Circuit that state courts know and follow the law. *Gentry*, at 1257, citing *Woodford v. Visciotti*, __U.S. __, 123 S.Ct. 357,

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8. Indeed, the dissenting judge pointed out "the panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under *Strickland*, had he lost, because he conceded that his clients were bad people . . ." *Gentry*, 2003 Daily Journal D.A.R. at 1260.

360, 154 L.Ed.2d 279 (2002) and *Early v. Packer*, __ U.S. __, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002).

The State urges this Court to grant certiorari to determine whether counsel must unearth all the evidence developed by habeas counsel to be competent, and whether counsel can render effective assistance by choosing lingering doubt over sympathy. This Court should also determine the Court of Appeals' authority to second-guess trial counsel regarding the efficacy of lingering doubt, twenty years after trial.

Therefore, this Petition should be granted to decide whether prejudice under *Strickland* requires a reasonable probability of a different verdict or merely requires a reasonable probability that a single juror may change his or her vote. The circuit courts are split on this issue and uniformity is required as to the standard they should use.

The Petition should also be granted to determine whether the Sixth Amendment right to counsel requires unearthing "all relevant mitigating information . . . for consideration at the capital sentencing phase" of a trial, (even without the defendant's cooperation) before the attorney may choose the defense to present.

CONCLUSION

Accordingly, respondent respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: March 20, 2003

Respectfully submitted,

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